

From: Bob Edelman [rmedelman@comcast.net]
Sent: Saturday, July 12, 2003 11:49 AM
To: Doug Ellis
Subject: Comments on proposed rule making

Doug,

I'd like to attend the July 22nd stakeholder meeting but am unable to because of a prior commitment. I have a few comments that I'd like considered.

1. The repeal of the forfeiture provisions of RCW 42.17.090 makes enforcement of disclosure by out-of-state, non-federal committees very difficult. I believe that was the reason that the burden was placed on the recipient. It was informally stated that the PDC would not pursue enforcement for C-5 violations by out-of-state organizations.

I don't have any ideas on how to make enforcement easier but I would like confirmation that the PDC will enforce disclosure. Otherwise it will be very easy for individuals and committees to illegally use shell organizations as conduits without detection.

2. I don't have any problem with deleting WAC 390-37-030(3) but I disagree with the reason. The comments incorrectly state, "Once the state takes any form of an action, the procedures in RCW 42.17.400(4) are no longer available for citizen complaints". The statute refers to the state commencing an action (i.e., a judicial proceeding), not taking "any form of action". The AG asking the PDC to investigate is not commencement of an action.

I assume the reference to EFF v. WEA is 2002 Wash. App. LEXIS 3408. According to that opinion, the AG had referred the case to the PDC and deferred to the charges that the PDC filed. The court denied EFF's motion to amend its complaint based on the priority of action doctrine. If the PDC had not brought charges then there would have been no commencement of action and the priority of action doctrine would not have applied.

I also don't understand the applicability of Crisman v. Pierce County. This was an unsuccessful attempt to use 42.17.400 for a private tort action.

3. Proposed WAC 390-37-041 incorrectly states, "[T]he statutory time periods are tolled when the attorney general or prosecutor forwards the complaint to the commission". The comments assert that the tolling provisions are set out in case law. I assume that reference is to the following:

Here, before the 10-day period had passed after EFF's second letter to the AG, the AG forwarded the allegations to the PDC for investigation. This was appropriate action for the AG to take and it tolls the 10-day deadline.

EFF v. WEA, 2002 Wash. App. LEXIS 3408 at 26.

This statement is dictum and, as such, has no precedential value. Again, the court denied EFF's motion to amend its complaint based on the priority of action doctrine, not on the assertion that the statute was tolled.

I feel very strongly that this proposed rule should not be promulgated. Since it is standard practice for the AG to refer all citizen action complaints to the PDC, the proposed rule would effectively gut the time provisions of RCW 42.17.400(4). The PDC could take any amount of time to process the complaint and might ultimately decide to take no action at all.

Thanks,

Bob Edelman

From: Bob Edelman [rmedelman@comcast.net]
Sent: Tuesday, August 05, 2003 6:40 PM
To: Doug Ellis
Subject: Re: EFF V. WEA Tolling Language

Doug,

Thanks. I had reviewed that case.

According to the opinion, the AG had referred the case to the PDC and deferred to the charges that the PDC filed. The court denied EFF's motion to amend its complaint based on the priority of action doctrine, not on the assertion that the statute had been tolled. Therefore, the statement is dictum and, as such, has no precedential value. If the PDC had not brought charges then there would have been no commencement of action and the priority of action doctrine would not have applied.

I'm sure that asking the PDC to investigate charges does not constitute commencement of an action. An "action" in the legal sense is a judicial proceeding. I don't believe that a rule based on interpreting the words "commence an action" in RCW 42.17.400(4) mean "initiate an investigation" would survive legal challenge.

Bob Edelman

From: Bob Edelman [rmedelman@comcast.net]
Sent: Tuesday, August 12, 2003 10:01 AM
To: Doug Ellis
Subject: Re: EFF V. WEA Tolling Language

Doug,

The trial court denied EFF's motion to amend its complaint to include allegations about the \$410,000 funds transfer "based on the priority of action rule". The action referred to was the AG deferring to the "charges that the PDC filed". The court found that the trial court had acted properly in denying EFF's motion to amend its pleadings.

If the facts stated in the opinion are correct, the trial court based it's decision on the fact that administrative charges were filed, not on the assertion that turning the charges over for investigation tolled the statute.

Bob